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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 678

JAMES G. NASH AND
CECILIA NASH, et al

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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FOR THE FIFTH CIRCUIT**

To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:

The Petitioners pray that a Writ of Certiorari issue to
review the judgments of the United States Court of Appeals
for the Fifth Circuit, entered in these causes:

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported,
appears at Appendix A, *infra*, pp. 10 to 14. The opinion
of the United States District Court for the Northern District
of Alabama, Southern Division, is reported by Commerce

Clearing House in Volume 68-2, U. S. Tax Cases ¶9513. A copy of that opinion is also appended as Appendix B, *infra*, pp. 15 to 21.

JURISDICTION

The judgments of the Court of Appeals for the Fifth Circuit were entered July 2, 1969. This Petition for Certiorari was filed less than ninety days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C., §1254 (1).

QUESTIONS PRESENTED

The primary question involved is whether Petitioners' partnership realized taxable income in the amount of an established reserve for bad debts upon the transfer of accounts receivable to controlled corporations, pursuant to Section 351 of the Internal Revenue Code of 1954, as amended (26 U.S.C., §351).

STATUTES INVOLVED

"§351. Transfer to Corporation Controlled by Transferee."

"(a) General Rule.—No gain or loss shall be recognized if property is transferred to a corporation (including, in the case of transfers made on or before June 30, 1967, an investment company) by one or more persons solely in exchange for stock or securities in such corporation and immediately after the exchange such person or persons are in control (as defined in section 368(c)) of the corporation. For purposes of this section, stock or securities issued for services shall not be considered as issued in return for property.

"(b) Receipt of Property.—If subsection (a) would

apply to an exchange but for the fact that there is received, in addition to the stock or securities permitted to be received under subsection (a), other property or money, then—

“(1) gain (if any) to such recipient shall be recognized, but not in excess of—

“(A) the amount of money received, plus

“(B) the fair market value of such other property received; and

“(2) no loss to such recipient shall be recognized. . . .”

* * *

STATEMENT OF THE CASE

These consolidated suits were brought in the District Court for the Northern District of Alabama to recover federal income taxes for the year 1961. Judgments in favor of the Petitioners were entered on June 12, 1968. The government filed its notices of appeal on August 12, 1968 to the Court of Appeals for the Fifth Circuit. Judgments of the District Court were reversed for the entry of judgments in favor of the United States.

Petitioners (James G. Nash and Cecilia Nash and Birmingham Trust National Bank, as Trustee under the James G. Nash, Jr. Trust and under the Margaret Nash Trust) were partners operating various finance businesses. The partnership used the accrual method of accounting and the reserve method of accounting for bad debts.

On June 1, 1960, the partnership separately incorporated eight of its finance businesses in accordance with Section 351 of the Internal Revenue Code of 1954, as amended (which permits tax-free transfers to a controlled corporation). Among the partnership assets transferred to the con-

trolled corporations were accounts receivable in the total amount of \$486,853.69. The partnership books also reflected a reserve for bad debts applicable to the accounts receivable in the amount of \$73,028.05. Petitioners received, in exchange for such transfer, stock and securities, including paid-in surplus, representing the net book value of fixed assets, accounts receivable (reduced by the amount of the reserve in question) and cash transferred.

Upon examination of the partnership return filed for the fiscal year ending January 31, 1961, the Commissioner determined that the partnership should have included as income the amount of the bad debt reserve (\$73,028.05) applicable to the accounts receivable transferred to the corporations on June 1, 1960. This adjustment in the partnership income led to tax deficiencies asserted against Petitioners for the calendar year 1961. Taxpayers paid the deficiencies and brought suits in the District Court after denial of their refund claims.

The three cases were consolidated and submitted to the District Court upon stipulated facts and upon the oral stipulation that the bad debt reserve in question was reasonable in amount. Judge Lynne held, as Petitioners contended, that the partnership was not required to include in its income the amount of the bad debt reserve. This decision was based on the authority of *Estate of Schmidt v. Commissioner*, 355 F. 2d 111 (9th Cir. 1966). The Government appealed from the judgments entered in favor of Petitioners to the Court of Appeals for the Fifth Circuit. The Court of Appeals reversed the judgments of the Petitioners and entered judgments in favor of the United States citing as authority the Tax Court decisions in *Estate of Schmidt*, 42 T.C. 1130, rev'd 355 F. 2d 111 (9th Cir. 1966) and *Schuster v. Commissioner*, 50 T.C. 98 (1968).

REASONS FOR GRANTING THE WRIT

(1) Directly in conflict with the decision of the Fifth Circuit in the instant cases is the decision of the Court of Appeals for the Ninth Circuit in *Estate of Schmidt v. United States*, 355 F. 2d 111 (1966). The existence of this direct conflict was noted by the Fifth Circuit in its opinion in Appendix A, at p. 12, *infra*. The Fifth Circuit bases its decision on the analysis made by the Tax Court in its opinion in the *Schmidt* case (reversed by the Ninth Circuit) found in 42 T.C. and its subsequent opinion in *Schuster v. Commissioner*, 50 T.C. 98.

(2) The question presented is of utmost importance in the administration of the federal tax laws. The *Schuster* case, *supra*, has been appealed to the Second Circuit Court of Appeals and is presently pending. There is presently pending in the Court of Claims the case of *Morton Jolles*, Docket No. 4014-67, which was filed in December, 1967, and involves this question. There are presently pending in the District Court for the Central District of California the cases of *George Scofield* and *Lefingwell Chemical Co.* involving this issue. In the Court of Appeals for the Sixth Circuit, there is presently pending the case of *Fred W. Rowe*, the decision of the District Court of Kentucky favorable to the taxpayer being reported in Commerce Clearing House Volume 69-1, at paragraph 9162. There are presently pending in the Tax Court of the United States the following cases:

Ritter Finance Co.	Docket No. 1756-68
Robert P. Hutton	Docket No. 1990-68
Israel J. Erlich	Docket No. 4871-67
Leland E. Mock	Docket No. 1493-69
Victor Gruber	Docket No. 5846-67

All of the above cases involve the precise question posed in Petitioners' cases.

In addition to the above pending cases, Petitioners have information that there are presently pending before the administrative levels of the Treasury Department nine separate cases involving this same question.

The question is one of both statutory interpretation and judicial precedent. In 1921, Congress enacted the predecessor of Section 351 of the Internal Revenue Code of 1954, as amended. This statute, providing for non-recognition of gain or loss upon the simple transition of a proprietorship or partnership to the form of a corporation, has been a part of the tax law since that time and in virtually the same form.

Petitioners do not agree or have they ever indicated an agreement with the proposition set forth by the Fifth Circuit on page 12 of Appendix A that "whenever the need for maintaining such reserve is no longer present, the amount carried as a reserve must be covered [sic] back into income, because the taxpayer has reduced his tax during the period of accumulation of the reserve. . ." Petitioners contend that the lack of need is not enough to result in the taxation of the reserve and there must be, in addition thereto, a *recovery*. The first announced position of the Treasury that the reserve for bad debts would be restored to income upon the transfer to a controlled corporation was set forth in Revenue Ruling 62-128, 1962-2, Cum. Bul. 139. The ruling limited its application to situations where additions to the reserve in prior years resulted in a tax benefit. This is essentially the same rule as set forth in Section 111 of the Internal Revenue Code. Under that section, the Commissioner in his regulations specifically requires that in order for taxable income to result there must be a *recovery*. Treas. Reg. §1.111 (a) (2).

The Petitioners respectfully submit that the statement of the Fifth Circuit on pages 13 and 14 in Appendix A relating to the difference in individual rates and corporate rates is, in reality, not relevant to the question presented. The rate of the individual may not always be more than the corporate rate. Furthermore, where bad debt reserves are carried over in corporate readjustments, such as in A, C, D and F reorganizations and subsidiary liquidations, the Commissioner is not concerned that the tax rate of the transferor corporation may be higher than the tax rate of the transferee corporation. Treas. Reg., §1.381 (c) (4)-1 (a) (1) (ii). These corporate readjustments involve nothing more than the mere change in the form of a business, similar to the Section 351 transfers to controlled corporations.

(3) The question presented is extremely important to the businessman who seeks to adjust his form of doing business. The reserve method of accounting for bad debts is frequently adopted by the proprietorship or partnership using the accrual method of accounting and contending with accounts receivable of consequence. As these businesses grow, they frequently for valid business reasons change to the corporate form. Congress, in enacting Section 351, sought to reduce interference of the tax laws with "necessary business readjustments." S. Rep. 275, 66 Cong., 1st Sess., p. 10 (1921); (1939 Cum. Bull. 1 (part 21, P. 181, 188-189)). Can the proprietorship or partnership transfer all of its assets and liabilities to the controlled corporation without incurring any tax upon the transfer under the theory of the Ninth Circuit, or must they artificially hold out these receivables and not transfer them to the corporation because of the position adopted by the Fifth Circuit in these cases and the Tax Court?

CONCLUSIONS

The decision of the Fifth Circuit in these cases and its conflict with the decision of the Ninth Circuit present an uncertain framework for the orderly transfer of proprietorship or partnership to controlled corporation. Furthermore, the failure to review this case will certainly create further confusion as to the direction to be taken in resolving the numerous identical matters pending at the judicial and administrative levels. Accordingly, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Alex W. Newton, of counsel for Petitioners herein, depose and say that on the — day of September, 1969, I served four copies of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the Respondent herein, the United States of America, by mailing the same to Johnnie M. Walters, Assistant Attorney General, Tax Division, Department of Justice, Washington, D. C. 20530, and one copy of this

Petition upon United States Attorney, by mailing the same to him at Post Office Box 195, Federal Building, Birmingham, Alabama, in envelopes with postage prepaid.

ALEX W. NEWTON

Sworn to and subscribed before me,
this — day of September, 1969.

Notary Public



APPENDIX A
OPINION OF THE COURT OF APPEALS

TUTTLE, CIRCUIT JUDGE: This appeal presents the issue as to the taxability of a reserve for bad debts, set up by individual taxpayers, upon their transfer of the accounts receivable owned by the taxpayers, to controlled corporations, under §351 of the 1954 Internal Revenue Code.¹

These consolidated suits were brought to recover federal income taxes for the year 1961. The taxes had been paid by the taxpayers, James G. Nash and his wife by joint return and Birmingham Trust National Bank as trustee under the James G. Nash, Jr. Trust and under the Margaret Nash Trust. These persons were partners operating various finance institutions. In their operation they used the accrual method of accounting and the reserve method of accounting for bad debts.

On June 1, 1960, the partnership separately incorporated eight of its finance businesses in accordance with §351, supra. Among the partnership assets transferred to the controlled corporations were accounts receivable in the

¹ (26 U.S.C. 1964 ed., Sec. 166.)

SEC. 351. TRANSFER TO CORPORATION CONTROLLED BY TRANSFEROR.

(a) [as amended by Sec. 203(a), Act of Nov. 13, 1966, P.L. 89-809, 80 Stat. 1539]

General Rule.—No gain or loss shall be recognized if property is transferred to a corporation (including, in the case of transfers made on or before June 30, 1967, an investment company) by one or more persons solely in exchange for stock or securities in such corporation and immediately after the exchange such person or persons are in control (as defined in section 368(c)) of the corporation. For purposes of this section, stock or securities issued for services shall not be considered as issued in return for property.

total amount of \$486,853.69. This represented the face amount of the accounts receivable. However, the partnership books at that time reflected a reserve for bad debts applicable to the accounts receivable in the amount of \$73,028.05. In setting up the books of account for the new corporation, the accounts receivable were shown at face value and then an item representing the proportionate part of the reserve for bad debts applicable to that particular account was deducted, purportedly then showing the net amount, which taxpayers contend represents the true or net value of the accounts.

The Commissioner determined that the partnership should have included for its final fiscal year ending January 31, 1961 the amount of the bad debt reserve, \$73,028.05, which the partnership had built up during its operation and which at the time of transfer to the corporations had not been used by specific charge-offs.

This case appears to be in all respects similar to the case of *Estate of Schmidt v. Commr.*, (9th Cir., 1968), 355 F.2d 111, in which the Court of Appeals for the Ninth Circuit reversed a decision of the Tax Court which had accepted the Commissioner's position as here urged upon us. In reversing the Tax Court, the Court of Appeals for the Ninth Circuit distinguished prior decisions of its own. *Arcadia Savings & Loan Assn. v. Commr.*, (9th Cir.) 300 F.2d 247 and *West Seattle Natl. Bank v. Commr.*, (9th Cir.) 288 F.2d 47.

After carefully considering the analysis made by the Tax Court in its opinion in the Schmidt case (before reversal by the Ninth Circuit) found in 42 T.C. and its subsequent opinion in *Schuster v. Commr.*, 50 T.C. 98, we have concluded that with deference, the Commissioner's position as supported by the Tax Court is sound and should be

adopted. We, therefore, respectfully disagree with the judgment and decision of the Court of Appeals announced in *Estate of Schmidt v. Commr., supra.*²

The parties agree substantially to the proposition that the setting up of a bad debt reserve by a taxpayer is an accounting practice which permits him to estimate in advance what proportion or percentage of his accounts receivable will not be collected. This system of accounting is recognized by regulations and, so long as the amounts deducted from income are deemed reasonable, they are allowed as a reduction in taxable income. The parties also agree substantially that whenever the need for maintaining such reserve is no longer present, the amount carried as reserve must be covered back into income, because the taxpayer has reduced his tax during the period of accumulation of the reserve and it is only just and proper under the taxing system that it be reported as income when it has fully served its purpose. Of course, generally, this occurs only upon final liquidation or upon sale of assets in a manner that demonstrates that they are worth face value.

The government contends that this rule should be applied with its full vigor here, since it says that when the individuals transferred the accounts receivable to the eight corporations, they, the transferors, could never need such

²Mertens seems to agree with this treatment. See Mertens Law of Federal Income Taxation, Vol. 3, §20.45 at page 127. See also Mertens §30.69 at page 132 where the text states: "The taxpayer should bear in mind that when all reason for maintaining a bad debt reserve ceases, the reserve then becomes an item of gross income, citing S. Rossin & Sons, Inc. v. Commr., 113 F.2d (2 Cir., 1940) reversing 40 B.T.A. 1274; Peabody Coal Co., 18, B.T.A. 1080 aff'd 55 F.2d 7 (7th Cir., 1931) [cert. den., 287 U.S. 605]. The subject is fully discussed on the following page in which at footnote 97(b) reference is made as to the Ninth Circuit decision in the Schmidt case.

a reserve because the accounts could never become worth less than face value in their hands. The taxpayers counter with the argument that the accounts were really transferred to the newly organized corporation at the *net* value which was represented by the face of the accounts less the reserve for bad debt.

Taxpayers lay great stress upon the purpose of §351, the section that permits the transfer of property to a corporation in return for a controlling stock ownership in the corporation without a recognition of either gain or loss in the hands of the transferor. It seems to us, however, that the government's position is at least technically correct: Without attempting to be too precise about expressing our views as to the main justification of such a tax free exchange or transfer, §351 is generally thought to permit a transfer in which the economic interests are still such after the transfer as that this is merely a postponement of either gain or loss *to the transferors*, until such gain or loss is actually realized *by them*. Here, where the accounts are received by the new corporations at the basis which they had in the hands of the transferors, it would really amount to a recognition of a loss in the hands of the transferors if they were permitted to "transfer" the reserve for bad debts to the transferee corporations.

Moreover, although the actual amount of tax difference might not be large, the correctness of the government's position seems to be strengthened by the following analysis: the deductions from income by the individual transferors as they annually set aside additions to the reserve resulted in lessening of the tax at individual rates, whereas the ultimate tax paid on any part of the reserve later determined not to be needed by the corporation or upon its decision to abandon the reserve method of accounting will be

taxed at corporate rates. This would not be a mere postponement of the incidence of the tax; there would also be a change of the identity of the taxpayer.

Being unable to add to the reasoning of the opinion of the Tax Court in the Schuster case, we conclude that it correctly states the law and upon the basis of the opinion in that case we conclude that the judgment in this court must be REVERSED for the entry of judgment in favor of the United States.

**APPENDIX B
OPINION OF THE DISTRICT COURT**

LYNNE, District Judge: It is hereby stipulated and agreed by and between the parties to the above cases, for the purpose of the trial of the above entitled and numbered cases, that upon the trial of said actions the following facts are admitted and agreed upon by the parties and shall be taken as true without any evidence being produced thereon. However, other and additional proof as to any fact or matter not consistent with the statements contained in this stipulation may be introduced by either of the parties:

1. James G. Nash, Birmingham Trust National Bank, as Trustee under the James G. Nash, Jr., Trust, and Birmingham Trust National Bank, as Trustee under the Margaret Nash Trust, were, during the calendar year 1961, partners in a partnership operating various finance businesses.
2. The partnership operated ten (10) distinct finance operations, eight (8) were conducted in Birmingham and Tuscaloosa, Alabama, and two (2) were conducted in Columbia and Greenville, South Carolina.
3. The partnership had as its taxable year the fiscal year ending January 31.
4. The partnership used the accrual method of accounting for reporting its income, and the reserve method of accounting for bad debts.
5. On June 1, 1960, the eight (8) Alabama finance companies were incorporated into eight (8) separate corporations organized under the laws of the State of Alabama.
6. As of May 31, 1960, the partnership books reflected accounts receivable in the Alabama operations in the face

amount of Four Hundred Eighty-six Thousand Eight Hundred Fifty-three and 69/100 Dollars (\$486,853.69) and a reserve for bad debts applicable thereto in the amount of Seventy-three Thousand Twenty-eight and 05/100 Dollars (\$73,028.05).

7. On June 1, 1960, the partnership transferred to the eight corporations, in compliance with Section 351 of the Internal Revenue Code of 1954, as amended, the following assets and liabilities solely in exchange for the stock and securities shown below:

(a) *Sun Finance Company of Tuscaloosa, Inc.*

Cash	\$ 1,411.03
Accounts Receivable	\$53,859.27
Less: Reserve for bad debts.....	8,078.89
	<hr/>
Furniture & Fixtures	3,458.73
Less: Reserve for Accumulated Depreciation	3,157.94
	<hr/>
	300.79
TOTAL ASSETS	\$47,492.20
Liabilities	11,449.55
Paid-In Surplus	1,042.65
Stock and Securities	35,000.00
	<hr/>
TOTAL LIABILITIES & CAPITAL...	\$47,492.20

(b) *Nash Finance Company of Birmingham, Inc.*

Cash	\$14,006.57
Accounts Receivable	\$85,847.52
Less: Reserve for bad debts.....	10,852.46
	<hr/>
Furniture & Fixtures	23,862.77

Less: Accumulated Depreciation 18,956.93

4,905.84

TOTAL ASSETS \$93,907.47

Liabilities 16,050.85

Paid-in Surplus 856.62

Stocks and Securities 77,000.00

TOTAL LIABILITIES & CAPITAL ... \$93,907.47

(c) *Sun Finance Company of Birmingham, Inc.*

Cash \$ 1,615.44

Accounts Receivable \$46,885.35

- Less: Reserve for bad debts.... 7,032.80

39,852.55

Furniture & Fixtures 4,150.41

Less: Accumulated Depreciation 3,038.81

1,111.60

TOTAL ASSETS \$42,579.59

Liabilities \$ 9,952.51

Paid-in Surplus 627.08

Stocks and Securities 32,000.00

TOTAL LIABILITIES & CAPITAL ... \$42,579.59

(d) *Nash Finance Company of Tuscaloosa, Inc.*

Cash \$ 2,363.58

Accounts Receivable \$69,976.11

- Less: Reserve for bad debts.... 10,496.42

59,479.69

Furniture & Fixtures 3,861.57

Less: Accumulated Depreciation 3,611.89

249.68

TOTAL ASSETS \$62,092.95

Liabilities	14,802.31
Paid-in Surplus	290.64
Stocks and Securities	47,000.00

TOTAL LIABILITIES & CAPITAL... \$62,092.95

(e) *Key Finance Company of Birmingham, Inc.*

Cash	\$ 1,351.06
Accounts Receivable	\$62,769.55
Less: Reserve for bad debts	9,341.93

Furniture & Fixtures	53,427.62
Less: Accumulated Depreciation	1,643.92

	1,952.86

TOTAL ASSETS

Liabilities	\$56,731.54
Paid-in Surplus	13,057.40
Stocks and Securities	674.14
	43,000.00

TOTAL LIABILITIES & CAPITAL... \$56,731.54

(f) *Gray Finance Company of Birmingham, Inc.*

Cash	\$ 2,487.61
Accounts Receivable	\$49,989.50
Less: Reserve for bad debts	7,498.42

Furniture & Fixtures	42,491.08
Less: Accumulated Depreciation	5,225.43

	4,565.09
	570.34

	\$45,549.03
TOTAL ASSETS	
Liabilities	10,635.08
Paid-in Surplus	913.95

Stocks and Securities	34,000.00
TOTAL LIABILITIES & CAPITAL...	\$45,549.03

(g) <i>Delta Finance Company of Tuscaloosa, Inc.</i>	
Cash	\$ 1,647.23
Accounts Receivable	\$58,187.24
Less: Reserve for bad debts.....	8,728.09
	<hr/>

Furniture & Fixtures	2,578.21
Less: Accumulated Depreciation	1,765.24
	<hr/>

TOTAL ASSETS	812.97
Liabilities	\$51,919.35
Paid-in Surplus	12,314.18
Stocks and Securities	605.17
	<hr/>
TOTAL LIABILITIES & CAPITAL...	\$51,919.35

(h) <i>Delta Finance Company of Birmingham, Inc.</i>	
Cash	\$ 1,226.82
Accounts Receivable	\$73,326.93
Less: Reserve for bad debts.....	10,999.04
	<hr/>

Furniture & Fixtures	4,671.53
Less: Accumulated Depreciation	3,044.80
	<hr/>
TOTAL ASSETS	1,626.73

Liabilities	\$65,181.44
Paid-in Surplus	15,513.84
Stocks and Securities	667.60
	<hr/>
TOTAL LIABILITIES & CAPITAL...	\$65,181.44

8. After their incorporation, the eight corporations continued to conduct the same businesses formerly conducted by the partnership.

9. The partnership duly and timely filed its tax return for the fiscal year ending January 31, 1961, reflecting taxable income of One Hundred One Thousand Four Hundred Fourteen and 87/100 Dollars (\$101,414.87). Taxpayers duly reported for the calendar year 1961 their applicable distributive shares of partnership income.

10. Upon examination, the Commissioner determined that for the fiscal year ending January 31, 1961, the partnership should include as taxable income Seventy-three Thousand Twenty-eight and 05/100 Dollars (\$73,028.05), the bad debt reserve applicable to the accounts receivable transferred to the corporations. As a result of this determination, the Commissioner assessed a deficiency for the calendar year 1961 against taxpayers as follows:

James G. Nash and Ceceila Nash.....	\$48,473.14
Birmingham Trust National Bank, as Trustee for James G. Nash, Jr.	1,042.96
Birmingham Trust National Bank, as Trustee for Margaret Nash	1,041.52

11. Taxpayers subsequently paid the deficiencies, plus interest to the date of payment, and timely filed a claim for refund seeking recovery of the deficiencies and interest. Upon a denial of the claim for refund within six (6) months after the filing thereof, the taxpayers filed this suit within the statutory period.

Findings of Fact and Conclusions of Law

These actions were consolidated for purpose of trial only and submitted for the final judgment of the court, with-

out the intervention of a jury, upon the pleadings, the order on pretrial hearing, and the stipulations of facts entered into by the attorneys of record for the respective parties hereto, together with the additional oral stipulation in open court that the bad debt reserves involved herein were reasonable in amount. Upon due consideration the court makes and enters the following findings of fact and conclusions of law.

Findings of Fact

The court finds the facts to be as stipulated in writing and orally.

Conclusions of Law

1. The court has jurisdiction of these actions and of the parties thereto.
2. The opinion in *Estate of Heinz Schmidt, Deceased v. Commissioner* [66-1 USTC ¶ 9202], 355 F.2d 111 (9th Cir. 1966), is precisely in point and persuades the court to decide the issue in favor of the respective plaintiffs.
3. Plaintiff Birmingham Trust National Bank, as Trustee of the Margaret Nash Trust, is entitled to recover of defendant in the amount of \$1,273.73, with interest as allowed by law, from November 2, 1965.
4. Plaintiffs James G. Nash and Cecilia Nash are entitled to recover of defendant in the amount of \$59,256.75, with interest as allowed by law from January 12, 1966.
5. Plaintiff Birmingham Trust National Bank, as Trustee under the James G. Nash, Jr. Trust, is entitled to recover of defendant in the amount of \$1,274.98, with interest as allowed by law from November 2, 1965.

Separate judgments in favor of plaintiffs are to be entered herein.